prisoners and to state prisoners as well.[467]

Considerations on Appeal

As a threshold matter, particularly in view of the exceptionally high percentage of FOIA cases decided by means of summary judgment, it should always be remembered that not all orders granting judgment to a party on a FOIA issue are immediately appealable.[468]

Once a case is on appeal, it is necessary for the government to obtain a stay of any trial court disclosure order, when disclosure is required by a date certain or when the order provides for disclosure "forthwith." The government's motion for such a stay should be granted as a matter of course in FOIA cases, as denial would destroy the status quo and would cause irreparable harm to the government appellant by mooting the issue on appeal, whereas granting such a stay causes relatively minimal harm to the appellee.[469]

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[467] See Willis v. FBI, No. 2:96-cv-276, slip op. at 1-2 (W.D. Mich. Oct. 21, 1996) (ordering warden of state prison to "place a hold on plaintiff's prisoner account" to provide for payment of filing fee).

[468] See, e.g., Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (court ruling that document is nonexempt, without accompanying disclosure order, held nonappealable); Ferguson v. FBI, 957 F.2d 1059, 1063-64 (2d Cir. 1992) (while "partial disclosure orders in FOIA cases are appealable," fact that district court may have erred in deciding question of law does not vest jurisdiction in appellate court when no disclosure order has yet been entered and, consequently, no irreparable harm would result); Center for Nat'l Sec. Studies v. CIA, 711 F.2d 409, 413-14 (D.C. Cir. 1983) (no appellate jurisdiction to review court order granting summary judgment to defendant on only one of twelve counts in complaint because order did not affect "predominantly all" merits of case and plaintiffs did not establish that denial of relief under 28 U.S.C. § 1292(a)(1) (1994) would cause them irreparable injury); see also Summers v. United States Dep't of Justice, 925 F.2d 450, 453 (D.C. Cir. 1991) (grant of stay of proceedings under Open America not appealable "final decision"); Rosenfeld v. United States, 859 F.2d 717, 727 (9th Cir. 1988) (award of interim attorney fees not appealable); Hinton v. FBI, 844 F.2d 126, 129-33 (3d Cir. 1988) (form of Vaughn order not appealable); In re Motion to Compel filed by Steele, 799 F.2d 461, 464-65 (9th Cir. 1986); Metex Corp. v. ACS Indus., 748 F.2d 150, 153 (3d Cir. 1984); Green v. Department of Commerce, 618 F.2d 836, 839-41 (D.C. Cir. 1980). But see John Doe Corp. v. John Doe Agency, 850 F.2d 105, 107-08 (2d Cir. 1988) (finding district court order denying motion for disclosure of documents, preparation of Vaughn Index and answers to interrogatories appealable, and reversing on merits), rev'd on other grounds, 493 U.S. 146 (1989); Irons v. FBI, 811 F.2d 681, 683 (1st Cir. 1987) (allowing government to appeal motion for partial summary judgment for plaintiff, stating that appellate jurisdiction vests at time order is made for government to turn over records).

[469] See, e.g., Assembly of Cal. v. United States Dep't of Commerce, No.

(continued...)

LITIGATION CONSIDERATIONS

The legal standard governing the scope of appellate review of FOIA decisions can best be described as "unsettled." The more recent trend in the law, led by the Court of Appeals for the Tenth Circuit, is to regard cases in which the district court awarded summary judgment as involving exclusively questions of law and to apply a purely de novo review standard.[470] This is entirely consistent with the nearly universal practice of adjudicating FOIA cases on the basis of summary judgment motions--which, in theory, can be utilized only in the absence of any material, factual disputes.[471]

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[469](...continued)
Civ-S-91-990, slip op. at 3 (E.D. Cal. Aug. 20, 1991) (order granting preliminary injunction and refusing to stay disclosure), stay denied, No. 91-16266 (9th Cir. Aug. 30, 1991), stay granted, 501 U.S. 1272 (1991); Rosenfeld v. United States Dep't of Justice, 501 U.S. 1227 (1991) (full stay pending appeal granted); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1307 (Marshall, Circuit Justice 1989) (granting stay based upon "balance of the equities"); see also Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); Antonelli v. FBI, 553 F. Supp. 19, 25 (N.D. Ill. 1982). But see Manos v. United States Dep't of the Air Force, No. 93-15672, slip op. at 2 (9th Cir. Apr. 28, 1993) (stay of district court disclosure order denied when government "failed to demonstrate . . . any possibility of success on the merits of its appeal," despite appellate court's recognition that such denial would render appeal moot); Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 5 (N.D. Cal. June 14, 1985) (denying stay of decision ordering release of, inter alia, classified information, because of governmental delay and "obfuscation"), stay denied, No. 85-1918 (9th Cir. July 18, 1985), stay denied, No. A-84 (Rehnquist, Circuit Justice July 31, 1985) (undocketed order); see also Armstrong v. Executive Office of the President, No. 89-142, slip op. at 2-6 (D.D.C. Feb. 27, 1995) (denying stay of determination that National Security Council is an "agency" under FOIA). See generally FOIA Update, Summer 1991, at 1-2.

[470] See Sheet Metal Workers Int'l Ass'n v. United States Air Force, 63 F.3d 994, 997 (10th Cir. 1995) ("[O]ur court reviews de novo any legal determinations made by the district court, once we have assured ourselves that the district court had `had an adequate factual basis upon which to base its decision.'" (quoting Anderson v. HHS, 907 F.2d 936, 942 (10th Cir. 1990))); Hale v. United States Dep't of Justice, 973 F.2d 894, 897 (10th Cir. 1992) ("[W]e decline the government's invitation to adopt a clearly erroneous standard."), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); KTVY-TV v. United States, 919 F.2d 1465, 1468 (10th Cir. 1990) (per curiam); Anderson, 907 F.2d at 942 ("[W]e must review de novo the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions.").

[471] See New England Apple Council v. Donovan, 725 F.2d 139, 141 n.2 (1st Cir. 1984) ("Rule 56(c) bars the district court from resolving any disputed factual issues at the summary judgment stage. Assuming the absence of genuine issues of material fact, the issue on appeal from a grant of summary judgment concerns whether the movant was entitled to judgment as a matter of law." (citing 10 Charles A. Wright et al. Federal Practice and Procedure § 2716 (1983))).

Most significantly, in its more recent pronouncements on this issue, the Court of Appeals for the District of Columbia Circuit has likewise embraced the de novo standard,[472] abandoning its prior divergent positions.[473] Similarly, the Court of Appeals for the Sixth Circuit initially adhered to a frequently adopted, two-pronged deferential approach--which limited appellate review to a determination of (1) whether the district court had an adequate factual basis for its determination, and (2) if so, whether the court's determination was clearly erroneous.[474] Lately, however, the Sixth Circuit has adopted the de novo standard instead.[475]

In contrast, the Court of Appeals for the Third Circuit undertakes de novo review of any questions of law, but limits review of factual issues to the two-pronged deferential standard.[476] This is likewise the current position of the Courts

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[472] Computer Prof'ls for Soc. Responsibility v. United States Secret Serv., 72 F.3d 897, 902 (D.C. Cir. 1996) ("We review orders granting summary judgment de novo."); Nation Magazine v. United States Customs Serv., 71 F.3d 885, 889 (D.C. Cir. 1995) ("We review de novo a district court's grant of summary judgment in favor of an agency which claims to have complied with FOIA."); Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994); see also Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1433 & n.3 (D.C. Cir. 1992) ("This circuit applies in FOIA cases the same standard of appellate review applicable generally to summary judgments." (explicitly contrasting Ninth Circuit's "clearly erroneous" standard and citing Washington Post Co. v. HHS, 865 F.2d 320, 325-26 & n.8 (D.C. Cir. 1989))).

[473] See King v. United States Dep't of Justice, 830 F.2d 210, 218 & n.63 (D.C. Cir. 1987) (when trial court has adequate factual basis for decision, appellate court should not disturb decision unless based on error of law or factual predicate that is clearly erroneous (citing Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 743 (9th Cir. 1980), and Kiraly v. FBI, 728 F.2d 273, 277 (6th Cir. 1984))); International Bhd. of Elec. Workers v. HUD, 763 F.2d 435, 435 (D.C. Cir. 1985) (district court's balancing under Exemption 6 should not be upset unless it is "`either based on an error of law or a factual predicate which is clearly erroneous'" (quoting Church of Scientology, 611 F.2d at 742)); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 563 (D.C. Cir. 1982) (district court's "findings of fact" that information qualified as "investigatory" under Exemption 7 held "not clearly erroneous").

[474] See Vaughn v. United States, 936 F.2d 862, 866 (6th Cir. 1991); Kiraly, 728 F.2d at 276; Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir. 1983).

[475] See Detroit Free Press, Inc. v. Department of Justice, 73 F.3d 93, 95 (6th Cir. 1996); Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994); Strout v. United States Parole Comm'n, 40 F.3d 136, 138 (6th Cir. 1994) (per curiam) (citing Moore v. Philip Morris Cos., 8 F.3d 335, 339 (6th Cir. 1993)).

[476] See, e.g., Manna v. United States Dep't of Justice, 51 F.3d 1158, 1162-63 (3d Cir. 1995); McDonnell v. United States, 4 F.3d 1227, 1242 (3d Cir. 1993).

of Appeals for the Fourth Circuit[477] and the Fifth Circuit.[478] It further appears that the Court of Appeals for the Seventh Circuit may have also adopted this view, albeit implicitly.[479] Decisions of the Court of Appeals for the Eleventh Circuit explicitly identify only the two-pronged, deferential standard of review for factual issues,[480] but presumably this circuit court, too, would not regard its evaluation of purely legal issues as constrained in any way.

The state of the law in the Courts of Appeals for the First and Ninth Circuits cannot be conclusively ascertained and perhaps best illustrates the confusion that frequently surrounds this issue. In an early case, the First Circuit alluded to an "abuse of discretion" standard,[481] but subsequently eschewed any deference to the district court's decision.[482] Then, in two 1987 decisions issued

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[477] See Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) ("Although any factual conclusions that place a document within a stated exemption of FOIA are reviewed under a clearly erroneous standard, `the question of whether a documents fits within one of FOIA's prescribed exemptions is one of law, upon which the district court is entitled to no deference.'" (quoting City of Va. Beach v. Department of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993))). But see Bowers v. United States Dep't of Justice, 930 F.2d 350 (4th Cir. 1991) (initially quoting two-pronged, deferential standard but further specifying that findings of fact not entitled to "clearly erroneous" deference); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288 & n.4 (4th Cir. 1987) (same).

[478] Compare Calhoun v. Lyng, 864 F.2d 34, 36 (5th Cir. 1988) (two-pronged, deferential standard of review), with Avondale Indus. v. NLRB, 90 F.3d 955, 958 (5th Cir. 1996) (de novo review appropriate when parties' dispute focuses "`not upon the unique facts of [the] case, but upon categorical rules,'" a question of law to which district court is not entitled to deference (quoting Halloran v. VA, 874 F.2d 315, 320 (5th Cir. 1989))).

[479] Compare Kaganove v. EPA, 856 F.2d 884, 886 (7th Cir. 1988) (questions of law reviewed de novo), with Becker v. IRS, 34 F.3d 398, 402 (7th Cir. 1994) (whether withheld material fits within established standards of exemption reviewed under two-pronged, deferential test), and Wright v. OSHA, 822 F.2d 642, 645 (7th Cir. 1987) (same), and DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984) ("We hold that the district court's factual finding that all of the requested documents that exist have been produced is not clearly erroneous.").

[480] See, e.g., Miscavige v. IRS, 2 F.3d 366, 367 (11th Cir. 1993); Currie v. IRS, 704 F.2d 523, 528 (11th Cir. 1983); Chilivis v. SEC, 673 F.2d 1205, 1210 (11th Cir. 1982).

[481] Columbia Packing Co. v. USDA, 562 F.2d 495, 500 (1st Cir. 1977) ("We are also satisfied that the court did not abuse its discretion [in its balancing under Exemption 6].").

[482] See New England Apple Council v. Donovan, 725 F.2d 139, 141 n.2 (1st Cir. 1984) ("Appellees incorrectly state that this court may reverse the district court only if its conclusions are `clearly erroneous.' In summary judgment there can be no review of factual issues, because Rule 56(c) bars the district court

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less than five months apart, it appeared to articulate opposite standards.[483] Its most recent application of a de novo standard of review was limited to review of the district court's determination of whether the government supplied an adequate Vaughn Index.[484] This issue, however, logically falls within the category of whether the district court had an adequate factual basis for its determination, a question which is subject to de novo review even in those circuits employing the more deferential, two-pronged test.[485]

A similar situation prevails in the Ninth Circuit. In a line of earlier cases, the Ninth Circuit routinely employed a pure, two-pronged deferential standard.[486] In two decisions rendered in 1996, however, the court appeared to change course and to have decided that whether an exemption had been properly applied involved a legal determination, one subject to de novo review.[487] Consequently,

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[482](...continued)
from resolving any disputed factual issues at the summary judgment stage.").

[483] Compare Aronson v. HUD, 822 F.2d 182, 188 (1st Cir. 1987) ("In reviewing a district court's grant of summary judgment, we apply the same standard as the district court."), with Irons, 811 F.2d at 684 ("where the conclusions of the trial court depend on its . . . choice of which competing inferences to draw from undisputed basic facts, appellate courts should defer to such fact-intensive findings, absent clear error"; however, questions of pure legal interpretation reviewed de novo).

[484] See Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 231 (1st Cir. 1994).

[485] See Davin v. United States Dep't of Justice, 60 F.3d 1043, 1048-49 (3d Cir. 1995) (review of adequacy of factual basis for district court's decision "is de novo and requires us to examine the affidavits below"); Wiener v. FBI, 943 F.2d 972, 978 (9th Cir. 1991) ("Whether the government's public affidavits constituted an adequate Vaughn index is a question of law reviewed de novo.").

[486] See Painting Indus. v. Air Force, 26 F.3d 1479, 1482 (9th Cir. 1994) ("We determine whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt."); Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916, 919 (9th Cir. 1992) ("In reviewing a district court's judgment under the FOIA, we `must determine whether the district judge had an adequate factual basis for his or her decision' and, if so, we `must determine whether the decision below was clearly erroneous.'" (quoting Church of Scientology, 611 F.2d at 742)); National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988); Lewis v. IRS, 823 F.2d 275, 377-78 (9th Cir. 1987) ("First, we determine whether the district court had an adequate factual basis on which to make its decision. If the district court had such an adequate basis, we review the district court's finding that the documents were exempt for clear error.").

[487] Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996) ("We must first determine
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in one of its most recent decisions, the Ninth Circuit was forced to frankly concede: "Our standard of review in FOIA cases is unclear."[488] In sum, the case law on this point simply cannot be reconciled among the various circuits, and conflicting decisions are not uncommon even within the same circuit.

In contrast, it is well settled that a trial court decision refusing to allow discovery will be reversed only if the court abused its discretion.[489] Similarly, a reverse FOIA case--which is brought under the Administrative Procedure Act[490]--is reviewed only with reference to whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," based upon the "whole [administrative] record."[491]

It is noteworthy that in routine FOIA cases where the merits and law of a case are so clear as to justify summary disposition, summary affirmance or reversal may be appropriate.[492] Other procedures are available for discharging the

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[487](...continued)
whether the district court had an adequate factual basis upon which to base its decision. If so, the district's conclusion of an exemption's applicability is reviewed de novo."); Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996) ("[W]hile we review the underlying facts supporting the district court's decision for clear error, we review de novo its conclusion [regarding the applicability of specific exemptions]."); see Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995) (district court's legal conclusions are reviewed de novo; review of factual issues limited to determining whether adequate factual basis supports district court's ruling and, if so, whether decision is clearly erroneous), petition for cert. dismissed, 116 S. Ct. 833 (1996).

[488] Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1082, 1085 (9th Cir. 1997); see Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997).

[489] See Anderson v. HHS, 80 F.3d 1500, 1507 (10th Cir. 1996) (district court decision to deny further discovery on attorney fees issue "was not an abuse of discretion"); Church of Scientology v. IRS, 991 F.2d 560, 562 (9th Cir. 1993), vacated in part on other grounds & remanded, No. 91-15730 (9th Cir. July 14, 1994); Meeropol v. Meese, 790 F.2d 942, 960 (D.C. Cir. 1986); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1988).

[490] 5 U.S.C. §§ 701-706 (1994).

[491] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979)); accord Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991).

[492] See, e.g., Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1980) (per curiam).

appellate court's functions in unusual procedural circumstances.[493]

Lastly, Rule 39(a) of the Federal Rules of Appellate Procedure is applied to award costs to the government when it is successful in a FOIA appeal; the D.C. Circuit has held that the presumption in Rule 39(a) favoring such awards of costs is fully applicable in FOIA cases.[494]

"REVERSE" FOIA

A "reverse" FOIA action is one in which the "submitter of information--usually a corporation or other business entity" that has supplied an agency with "data on its policies, operations or products--seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request."[1] The agency's decision to release the information will ordinarily "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the information falls within one or more of the statutory exemptions."[2] Typically, the submitter contends that the

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[493] See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (inappropriate to vacate district court order, after fully complied with, when attorney fees issue pending; proper procedure is to dismiss appeal); Larson v. Executive Office for United States Attorneys, No. 85-6226, slip op. at 4 (D.C. Cir. Apr. 6, 1988) (when only issue on appeal is mooted, initial lower court order should be vacated without prejudice and case remanded).

[494] See Baez v. United States Dep't of Justice, 684 F.2d 999, 1005-07 (D.C. Cir. 1982) (en banc).

[1] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 11 (D.D.C. 1996) (in reverse FOIA actions "courts have jurisdiction to hear complaints brought by parties claiming that an agency decision to release information adversely affects them"), appeal voluntarily dismissed, No. 96-5163 (D.C. Cir. July 3, 1996); see Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997) (submitter challenged agency order requiring it to publicly disclose information, which was issued in context of federal licensing requirements and was not connected to any FOIA request); see also McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (submitter challenged agency release decision that was based upon disclosure obligation imposed by Federal Acquisition Regulation (FAR), rather than by FOIA request), and McDonnell Douglas Corp. v. Widnall, No. 92-2211, slip op. at 8 (D.D.C. Apr. 11, 1994) (same), cases consolidated on appeal & remanded for further development of the record, 57 F.3d 1162, 1167 (D.C. Cir. 1995).

[2] CNA, 830 F.2d at 1134 n.1; see Alexander & Alexander Servs. v. SEC, No. 92-1112, slip op. at 23, 26 (D.D.C. Oct. 19, 1993) (agency determined that Exemptions 4, 7(B), and 7(C) did not apply to certain requested information and

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requested information falls within Exemption 4 of the FOIA,[3] but submitters have also challenged the contemplated disclosure of information that they contended was exempt under other FOIA exemptions as well.[4]

In a reverse FOIA suit "the party seeking to prevent a disclosure the government itself is otherwise willing to make" assumes the "burden of justifying nondisclosure."[5] Moreover, a challenge to an agency's disclosure decision is reviewed in light of the "basic policy" of the FOIA to "`open agency action to the light of public scrutiny'" and consistent with the "narrow construction" afforded to

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[2](...continued)
"chose not to invoke" Exemption 5 for certain other requested information), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996). See generally Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions); FOIA Update, Spring 1994, at 3.

[3] 5 U.S.C. § 552(b)(4) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[4] See Bartholdi, 114 F.3d at 282 (denying submitter's request for injunction based on claim that agency's balancing of interests under Exemption 6 was "arbitrary or capricious" and holding that "even were [the submitter] correct that its submissions fall within Exemption 6, the [agency] is not required to withhold the information from public disclosure" as "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information"); Na Iwi O Na Kupuna v. Dalton, 894 F. Supp. 1397, 1411-13 (D. Haw. 1995) (denying plaintiff's request to enjoin release of information that plaintiff contended was exempt pursuant to Exemptions 3 and 6); Church Universal & Triumphant, Inc. v. United States, No. 95-0163, slip op. at 2, 3 & n.3 (D.D.C. Feb. 8, 1995) (rejecting submitter's argument "that the documents in question are `return information' that is protected from disclosure under" Exemption 3, but sua sponte asking agency "to consider whether any of the materials proposed for disclosure are protected by" Exemption 6); Alexander, No. 92-1112, slip op. at 23, 24, 26 (D.D.C. Oct. 19, 1993) (agreeing with submitter that Exemption 7(C) should have been invoked and ordering agency to withhold additional information; finding that submitter failed to "timely provide additional substantiation" to justify its claim that Exemption 7(B) applied; and finding that deliberative process privilege of Exemption 5 "belongs to the governmental agency to invoke or not," noting "absence of any record support" that agency, "as a general matter, arbitrarily declined to invoke that privilege").

[5] Martin Marietta Corp. v. Dalton, No. 94-2702, 1997 WL 459831, at *5 n.4. (D.D.C. Aug. 8, 1997); accord Frazee v. United States Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996) ("party seeking to withhold information under Exemption 4 has the burden of proving that the information is protected from disclosure").

the FOIA's exemptions.[6] If the underlying FOIA request is subsequently withdrawn, the basis for the court's jurisdiction will dissipate and the case will be dismissed as moot.[7]

The landmark case in the reverse FOIA area is Chrysler Corp. v. Brown, in which the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA itself "because Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure."[8] Moreover, the Supreme Court held that jurisdiction cannot be based on the Trade Secrets Act[9] (a broadly worded criminal statute prohibiting the unauthorized disclosure of "practically any commercial or financial data collected by any federal employee

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[6] Martin Marietta, 1997 WL 459831, at *4 (quoting United States Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976)); accord Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (explaining that "statutory policy favoring disclosure requires that the opponent of disclosure" bear burden of persuasion); see also Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, slip op. at 3 (W.D. Ark. Feb. 5, 1997) (examining submitter's claims in light of "the policy of the United States government to release records to the public except in the narrowest of exceptions" and observing that "[o]penness is a cherished aspect of our system of government") (appeal pending).

[7] See McDonnell Douglas Corp. v. NASA, No. 95-5288, slip op. at 1 (D.C. Cir. Apr. 1, 1996) (ordering reverse FOIA case "dismissed as moot in light of the withdrawal of the [FOIA] request at issue"); General Dynamics Corp. v. Department of the Air Force, No. 92-5186, slip op. at 1 (D.C. Cir. Sept. 23, 1993) (same); Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985) (deciding that when FOIA request withdrawn while case on appeal, dispute that was once before court became moot); cf. Sterling v. United States, 798 F. Supp. 47, 48 (D.D.C. 1992) (declaring that once record has been released, "there are no plausible factual grounds for a `reverse FOIA' claim"), aff'd, No. 93-5264 (D.C. Cir. Mar. 11, 1994). See generally Kansas Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (holding that submitter's "unsuccessful earlier attempt" to suppress disclosure in state court "effectively restrains it" from raising same arguments again in reverse FOIA action).

[8] 441 U.S. 281, 293-94 (1979); accord Bartholdi, 114 F.3d at 281 ("mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information"); RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996) ("FOIA itself does not provide a cause of action to a party seeking to enjoin an agency's disclosure of information, even if the information requested falls within one of FOIA's exemptions"), aff'd, No. 96-6186, 1997 WL 134413 (2d Cir. Mar. 26, 1997), affirmance vacated without explanation (2d Cir. Apr. 17, 1997); Kansas Gas, No. 87-2748, slip op. at 3 (D.D.C. July 2, 1993) ("party seeking to prevent disclosure . . . must rely on other sources of law, independent of FOIA, to justify enjoining disclosure").

[9] 18 U.S.C. § 1905 (1994).

from any source"[10]), because it is a criminal statute that does not afford a "private right of action."[11] Instead, the Court found that review of an agency's "decision to disclose" requested records[12] can be brought under the Administrative Procedure Act (APA).[13] Accordingly, reverse FOIA plaintiffs ordinarily argue that an agency's contemplated release would violate the Trade Secrets Act and thus would "not be in accordance with law" or would be "arbitrary and capricious" within the meaning of the APA.[14]

In Chrysler, the Supreme Court specifically did not address the "relative ambits" of Exemption 4 and the Trade Secrets Act, nor did it determine whether the Trade Secrets Act qualified as an Exemption 3[15] statute.[16] Almost a decade later, the Court of Appeals for the District of Columbia Circuit, after repeatedly

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[10] CNA, 830 F.2d at 1140.

[11] Chrysler, 441 U.S. at 316-17.

[12] Id. at 318.

[13] 5 U.S.C. §§ 701-706 (1994); see, e.g., CC Distribs. v. Kinzinger, No. 94-1330, slip op. at 5 (D.D.C. June 28, 1995) ("neither FOIA nor the Trade Secrets Act provides a cause of action to a party who challenges an agency decision to release information . . . [but] a party may challenge the agency's decision" under APA); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 513 (E.D. Va. 1994) ("sole recourse" of "party seeking to prevent an agency's disclosure of records under FOIA" is review under APA); Atlantis Submarines Haw., Inc. v. United States Coast Guard, No. 93-00986, slip op. at 5 (D. Haw. Jan. 28, 1994) (in reverse FOIA suit, "an agency's decision to disclose documents over the objection of the submitter is reviewable only under" APA) (denying motion for preliminary injunction), dismissed per stipulation (D. Haw. Apr. 11, 1994); Environmental Tech., Inc. v. EPA, 822 F. Supp. 1226, 1228 (E.D. Va. 1993).

[14] See, e.g., McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as `contrary to law' within the meaning of" APA); Acumenics Research & Tech. v. Department of Justice, 843 F.2d 800, 804 (4th Cir. 1988); General Elec. Co. v. NRC, 750 F.2d 1394, 1398 (7th Cir. 1984); Cortez, 921 F. Supp. at 11; Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 5 (D.D.C. Sept. 2, 1993); General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 806 (D.D.C. 1992), vacated as moot, No. 92-5186 (D.C. Cir. Sept. 23, 1993); McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (bench order), remanded, No. 92-5342 (D.C. Cir. Feb. 14, 1994); Raytheon Co. v. Department of the Navy, No. 89-2481, slip op. at 4 (D.D.C. Dec. 22, 1989).

[15] 5 U.S.C. § 552(b)(3).

[16] 441 U.S. at 319 n.49.

skirting these difficult issues, "definitively" resolved them.[17] With regard to the Trade Secrets Act and Exemption 3, the D.C. Circuit held that the Trade Secrets Act does not qualify as an Exemption 3 statute under either of that exemption's subparts, particularly as it acts only as a prohibition against "unauthorized" disclosures.[18] Indeed, because "agencies conceivably could control the frequency and scope of its application through regulations adopted on the strength of statutory withholding authorizations which do not themselves survive the rigors of Exemption 3," the D.C. Circuit found it inappropriate to classify the Trade Secrets Act as an Exemption 3 statute.[19] (For a further discussion of this point, see Exemption 3, Additional Considerations, above.)

In addition, the D.C. Circuit ruled that the scope of the Trade Secrets Act is not narrowly limited to that of its three predecessor statutes and that, instead, its scope is "at least co-extensive with that of Exemption 4."[20] Thus, information falling within the ambit of Exemption 4 would also fall within the scope of the Trade Secrets Act.[21] Accordingly, in the absence of a statute or properly promulgated regulation giving an agency authority to release the information--which would remove the Trade Secrets Act's disclosure prohibition[22]--

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[17] CNA, 830 F.2d at 1134.

[18] Id. at 1141.

[19] Id. at 1139-40.

[20] Id. at 1151; accord Bartholdi, 114 F.3d at 281 (citing CNA, court declares: "[W]e have held that information falling within Exemption 4 of [the] FOIA also comes within the Trade Secrets Act."); Alexander, No. 92-1112, slip op. at 21 (D.D.C. Oct. 19, 1993); General Dynamics, 822 F. Supp. at 806. But see McDonnell Douglas, 57 F.3d at 1165 n.2 (D.C. Circuit panel noting in dicta that "we suppose it is possible that this statement [from CNA] is no longer accurate in light of [the court's] recently more expansive interpretation of the scope of Exemption 4" in Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992)).

[21] See, e.g., Bartholdi, 114 F.3d at 281 (when information is shown to be protected by Exemption 4, government is generally "precluded from releasing" it due to provisions of Trade Secrets Act); McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 322 n.4 (D.D.C. 1995) (because two provisions are "co-extensive," it is "unnecessary to perform a redundant analysis"), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996); Chemical Waste Management, Inc. v. O'Leary, No. 94-2230, slip op. at 1 n.1 (D.D.C. Feb. 28, 1995) ("analysis under either regime is identical"); Raytheon, No. 89-2481, slip op. at 4 (D.D.C. Dec. 22, 1989).

[22] See, e.g., RSR, 924 F. Supp. at 512 (Clean Water Act and "regulations promulgated under it permit disclosure" of submitter's "effluent data" and so agency's contemplated disclosure of such data is authorized by law); McDonnell Douglas, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (FAR disclosure provision serves as legal authorization for agency to release exercised option

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a determination that requested material falls within Exemption 4 is tantamount to a determination that the material cannot be released, because to do so would violate the Trade Secrets Act.[23] To the extent information falls outside the scope of Exemption 4, the D.C. Circuit found that there was no need to determine whether it nonetheless still fits within the outer boundaries of the Trade Secrets Act.[24] Such a ruling was unnecessary because the FOIA itself would provide the necessary authorization to release any information not falling within one of its exemptions.[25]

Standard of Review

In Chrysler Corp. v. Brown, the Supreme Court held that the Administrative Procedure Act's predominant scope and standard of judicial review--review on the administrative record according to an arbitrary and capricious standard--should "ordinarily" apply to reverse FOIA actions.[26] Indeed, the Court of Appeals for the District of Columbia Circuit has strongly emphasized that judicial review

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[22](...continued)
prices and thus such prices are "not protected from disclosure by the Trade Secrets Act"); McDonnell Douglas, No. 92-2211, slip op. at 8 (D.D.C. Apr. 11, 1994) (same); St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979); Jackson v. First Fed. Sav., 709 F. Supp. 887, 890-94 (E.D. Ark. 1989). See generally Bartholdi, 114 F.3d at 281-82 (rejecting challenge to validity of disclosure regulation for failure to first exhaust issue before agency); South Hills Health Sys. v. Bowen, 864 F.2d 1084, 1093 (3d Cir. 1988) (rejecting challenge to validity of disclosure regulation as unripe).

[23] See CNA, 830 F.2d at 1151-52; see also Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (when release of requested information is barred by the Trade Secrets Act, agency "does not have discretion to release it"); Environmental Tech., 822 F. Supp. at 1228 (Trade Secrets Act "bars disclosure of information that falls within Exemption 4"); General Dynamics, 822 F. Supp. at 806 (Trade Secrets Act "is an independent prohibition on the disclosure of information within its scope"); see also FOIA Update, Summer 1985, at 3 (discussing Trade Secrets Act bar to discretionary disclosure under Exemption 4).

[24] CNA, 830 F.2d at 1152 n.139.

[25] Id.; see also Frazee, 97 F.3d at 373 (emphasizing that submitters gave "no reason as to why the Trade Secrets Act should, in their case, provide protection from disclosure broader than the protection provided by Exemption 4 of [the] FOIA" and finding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act"); Alexander, No. 92-1112, slip op. at 21 (D.D.C. Oct. 19, 1993) (declaring that "if the documents are not deemed confidential pursuant to Exemption 4, they will not be protected under the Trade Secrets Act").

[26] 441 U.S. 281, 318 (1979); accord Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991).

in reverse FOIA cases should be based on the administrative record, with de novo review reserved for only those cases in which an agency's administrative procedures were "severely defective."[27]

The D.C. Circuit subsequently reaffirmed its position on the appropriate scope of judicial review in reverse FOIA cases, holding that the district court "behaved entirely correctly" when it rejected the argument advanced by the submitter--that it was entitled to de novo review because the agency's factfinding procedures were inadequate--and instead confined its review to an examination of the administrative record.[28] The Court of Appeals for the Ninth Cir

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[27] National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 745 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring in result); accord Acumenics Research & Tech. v. United States Dep't of Justice, 843 F.2d 800, 804-05 (4th Cir. 1988); RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996), aff'd, No. 96-6186, 1997 WL 134413 (2d Cir. Mar. 26, 1997), affirmance vacated without explanation (2d Cir. Apr. 17, 1997); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 513 (E.D. Va. 1994); Burnside-Ott Aviation Training Ctr. v. United States, 617 F. Supp. 279, 282-84 (S.D. Fla. 1985); cf. Alcolac, Inc. v. Wagoner, 610 F. Supp. 745, 749 (W.D. Mo. 1985) (agency's decision to deny claim of confidentiality upheld as "rational"). But see Carolina Biological Supply Co. v. USDA, No. 93CV00113, slip op. at 4 & n.2 (M.D.N.C. Aug. 2, 1993) (applying de novo review after observing that standard of review issue presented close "judgment call"); Artesian Indus. v. HHS, 646 F. Supp. 1004, 1005-06 (D.D.C. 1986) (court flatly rejected position advanced by both parties that it should base its decision on agency record according to arbitrary and capricious standard).

[28] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987); see, e.g., RSR, 924 F. Supp. at 509 (agency's factfinding procedures found adequate when submitter was "promptly notified" of FOIA request and "given an opportunity to object to disclosure" and "to substantiate [those] objections" before agency decision made); Comdisco, 864 F. Supp. at 514 (because submitter "accorded a full and fair opportunity to state and support its position on disclosure, it cannot be said" that agency's factfinding procedures were inadequate); see also CC Distribs. v. Kinzinger, No. 94-1330, slip op. at 6 (D.D.C. June 28, 1995) (review confined to record when submitter did "not actually challenge the agency's factfinding procedures," but instead challenged how agency "applied" those procedures); Chemical Waste Management, Inc. v. O'Leary, No. 94-2230, slip op. at 7 n.4 (D.D.C. Feb. 28, 1995) (although agency's factfinding itself found to be inadequate, agency's "factfinding procedures" not challenged and so court's review limited to agency record). See generally General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 806-07 (D.D.C. 1992), vacated as moot, No. 92-5186 (D.C. Cir. Sept. 23, 1993); McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (bench order) (recognizing that court has "very limited scope of review"), remanded, No. 92-5342 (D.C. Cir. Feb. 14, 1994); International Computaprint Corp. v. United States Dep't of Commerce, No. 87-1848, slip op. at 12-13 (D.D.C. Aug. 16, 1988); Davis Corp. v. United States, No. 87-3365, slip op. at 5

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cuit, similarly rejecting a submitter's challenge to an agency's factfinding procedures, has also held that judicial review is properly based on the administrative record in a reverse FOIA suit.[29]

Because judicial review in reverse FOIA cases is ordinarily based on a review of an agency's administrative record, it is vitally important that agencies take care to develop a comprehensive one.[30] Indeed, the Court of Appeals for the Seventh Circuit once chastised an agency for failing to develop an adequate record in a reverse FOIA action. Although recognizing that procedures designed to determine the confidentiality of requested records need not be "as elaborate as a licensing," it found that the agency's one-line decision rejecting the submitter's position "validates congressional criticisms of the excessive casualness displayed by some agencies in resolving disputes over the application of exemption 4."[31]

Similarly, the D.C. Circuit has remanded several reverse FOIA cases back to the agency for development of a more complete administrative record. In one, the D.C. Circuit ordered a remand so that it would have the benefit of "one considered and complete statement" of the agency's position on disclosure.[32] In another, the D.C. Circuit reversed the decision of the district court, which had permitted an inadequate record to be supplemented in court by an agency affidavit, holding that because the agency had failed at the administrative level to

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[28](...continued)
(D.D.C. Jan. 19, 1988).

[29] Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1348 (9th Cir. 1990).

[30] See Reliance, 924 F.2d at 277 (insisting that court "cannot properly perform" its reviewing function "unless the agency has explained the reasons for its decision"); see also McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 323-24 (D.D.C. 1995) (ordering record supplemented after finding that certain documents "specifically referenced" in submitter's letter to agency "were improperly omitted from the administrative record" and holding that even though those referenced documents had not been examined by agency, the letter itself was, and agency "cannot pick and choose what information in the document will be considered"), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996). Compare McDonnell Douglas, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (finding agency's action arbitrary and capricious based on insufficient agency record), with General Dynamics, 822 F. Supp. at 806 (deeming agency's action not to be arbitrary and capricious based upon "lengthy and thorough" administrative record).

[31] General Elec. Co. v. NRC, 750 F.2d 1394, 1403 (7th Cir. 1984) (remanding case for elaboration of basis for agency's decision).

[32] McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (inexplicably deeming case to have come to court in "unusual posture" with "confusing administrative record" stemming from "intersection" of FOIA actions and contract award announcements).

give a reason for its refusal to withhold certain price information, it was precluded from offering a "post-hoc rationalization" for the first time in court.[33]

Likewise, the court ordered a remand after holding that an "agency's administrative decision must stand or fall upon the reasoning advanced by the agency therein" and that an "agency cannot gain the benefit of hindsight in defending its decision" by advancing a new argument once the matter gets to litigation.[34] Thus, the D.C. Circuit has emphasized that judicial review in reverse FOIA cases must be conducted on the basis of the "administrative record compiled by the agency in advance of litigation."[35] Of course, agency affidavits that do "no more than summarize the administrative record" have been found to be permissible.[36]

In another case remanded to the agency for further proceedings due to an inadequate record, the D.C. Circuit rejected the argument proffered by the agency that a reverse FOIA plaintiff bears the burden of proving the "non-public availability" of information, finding that it is "far more efficient, and obviously fairer" for that burden to be placed on the party who claims that the information is public.[37] The D.C. Circuit also upheld the district court's requirement that the agency prepare a document-by-document explanation for its denial of confidential treatment.[38] Specifically, the D.C. Circuit found that the agency's burden of justifying its decision "cannot be shirked or shifted to others simply because the decision was taken in a reverse-FOIA rather than a direct FOIA context."[39] Moreover, it observed, in cases in which the public availability of information is

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[33] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987).

[34] Data-Prompt, Inc. v. Cisneros, No. 94-5133, slip op. at 3 (D.C. Cir. Apr. 5, 1995).

[35] AT&T, 810 F.2d at 1236; see also CC Distribs., No. 94-1330, slip op. at 6 (D.D.C. June 28, 1995) (declining to consider affidavits proffered by submitters, as such affidavits "are not properly before the Court"); Chemical Waste, No. 94-2230, slip op. at 7 n.4 (D.D.C. Feb. 28, 1995) (same); Alexander & Alexander Servs. v. SEC, No. 92-1112, slip op. at 18 n.9 (D.D.C. Oct. 19, 1993) (refusing to allow submitter to supplement record), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996); General Dynamics, 822 F. Supp. at 805 n.1 (same).

[36] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988); accord McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 238 n.2 (E.D. Mo. 1996) (agency affidavit that "helps explain the administrative record" permitted), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996); Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 16 (D.D.C. Sept. 2, 1993) (agency affidavit that "merely elaborates" on basis for agency decision and "provides a background for understanding the redactions" permitted); see also, e.g., International Computaprint, No. 87-1848, slip op. at 12 n.36 (D.D.C. Aug. 16, 1988).

[37] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989).

[38] Id. at 343-44.

[39] Id. at 344.

the basis for an agency's decision to disclose, the justification of that position is "inevitably document-specific.[40] Similarly, the District Court for the District of Columbia ordered a remand in a case in which the agency "never did acknowledge," let alone "respond to," the submitter's competitive harm argument.[41]

Rather than order a remand, however, that same court, in an earlier case, simply ruled against the agency--even going so far as to permanently enjoin it from releasing the requested information--on the basis of a record that it found insufficient under the standards of the APA.[42] Specifically, the court noted that the agency "did not rebut any of the evidence produced" by the submitter, "did not seek or place in the record any contrary evidence, and simply ha[d] determined" that the evidence offered by the submitter was "insufficient or not credible."[43] This, the court found, "is classic arbitrary and capricious action by a government agency."[44] When the agency subsequently sought an opportunity to "remedy" those "inadequacies in the record" by seeking a remand, the court declined to order one, reasoning that the agency was "not entitled to a second bite of the apple just because it made a poor decision [for,] if that were the case, administrative law would be a never ending loop from which aggrieved parties would never receive justice."[45]

Conversely, this same court readily upheld an agency's disclosure determination on the basis of an administrative record that demonstrated that the agency "specifically considered" and "understood" the arguments of the submitter

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[40] Id.

[41] Chemical Waste, No. 94-2230, slip op. at 11-12 (D.D.C. Feb. 28, 1995).

[42] McDonnell Douglas, No. 91-3134, transcript at 5-6, 10 (D.D.C. Jan. 24, 1992).

[43] Id. at 6.

[44] Id.; see also McDonnell Douglas, 922 F. Supp. at 241-42 (declaring agency "arbitrary and capricious" because its "finding that the documents [at issue] were required [to be submitted was] not supported by substantial evidence in the agency record" and elaborating that it was "not at all clear" that agency "even made a factual finding on [that] issue" and "to the extent" that it "did consider the facts of [the] case, it viewed only the facts favorable to its predetermined position"); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 13 (D.D.C. 1996) (declaring agency decision "not in accordance with law" when "[n]either the administrative decision nor the sworn affidavits submitted by the [agency] support the conclusion that [the submitter] was required to provide" requested information), appeal voluntarily dismissed, No. 96-5163 (D.C. Cir. July 3, 1996). See generally Environmental Tech., Inc. v. EPA, 822 F. Supp. 1226, 1230 (E.D. Va. 1993) (perfunctorily granting submitter's motion for permanent injunction without even addressing adequacy of agency record).

[45] McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 319 (D.D.C. 1995) (permanent injunction ordered to "remain[] in place"), aff'd for agency failure to timely raise argument, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

and "provided reasons for rejecting them."[46] In so ruling, the court took note of the "lengthy and thorough" administrative process, during which the agency "repeatedly solicited and welcomed" the submitter's views on the applicability of a FOIA exemption.[47] This record demonstrated that the agency's action was not arbitrary or capricious.[48]

Similarly, when an agency provided a submitter with "numerous opportunities to substantiate its confidentiality claim," afforded it "vastly more than the amount of time authorized" by its regulations, and "explain[ed] its reasons for [initially] denying the confidentiality request," the court found that the agency had "acted appropriately by issuing its final decision denying much of the confidentiality request on the basis that it had not received further substantiation."[49] In so holding, the court specifically rejected the submitter's contention that "it should have received even more assistance" from the agency and held that the agency was "under no obligation to segregate the documents into categories or otherwise organize the documents for review."[50] The court also specifically noted that the agency's acceptance of some of the submitter's claims for confidentiality in this matter "buttresses" the conclusion that its decision was "rational."[51]

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[46] General Dynamics, 822 F. Supp. at 807.

[47] Id. at 806.

[48] Id. at 807; see, e.g., Atlantis Submarines Haw., Inc. v. United States Coast Guard, No. 93-00986, slip op. at 10 (D. Haw. Jan. 28, 1994) (finding that agency "appears to have fully examined the evidence and carefully followed its own procedures," that its decision to disclose "was conscientiously undertaken" and that it thus was not "arbitrary and capricious") (denying motion for preliminary injunction), dismissed per stipulation (D. Haw. Apr. 11, 1994); Source One Management, Inc. v. United States Dep't of the Interior, No. 92-Z-2101, transcript at 4 (D. Colo. Nov. 10, 1993) (bench order) (declaring that "Government has certainly been open in listening to" submitter's arguments "and has made a decision which . . . is rational and is not an abuse of discretion and is not arbitrary and capricious"); Lykes Bros., No. 92-2780, slip op. at 15 (D.D.C. Sept. 2, 1993) (noting that agency "provided considerable opportunity" for submitters to "contest the proposed disclosures, and provided sufficient reasons on the record for rejecting" submitters' arguments).

[49] Alexander, No. 92-1112, slip op. at 12-14 (D.D.C. Oct. 19, 1993); see CC Distribs., No. 94-1330, slip op. at 6 n.2 (D.D.C. June 28, 1995) (ruling that agency's procedures were adequate when agency gave submitter "adequate notice" of existence of FOIA request, afforded it "numerous opportunities to explain its position," repeatedly advised it to state its objections "with particularity," and "at least, provided [submitter] with occasion to make the best case it could").

[50] Alexander, No. 92-1112, slip op. at 12, 13 n.5 (D.D.C. Oct. 19, 1993).

[51] Id. at 14 n.6; accord Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, slip op. at 6 (W.D. Ark. Feb. 5, 1997) (finding it significant that record

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Executive Order 12,600

Administrative practice in potential reverse FOIA situations is generally governed by an executive order issued a decade ago. Executive Order 12,600 requires federal agencies to establish certain predisclosure notification procedures which will assist agencies in developing adequate administrative records.[52] The executive order recognizes that submitters of proprietary information have certain procedural rights and it therefore mandates that notice be given to submitters of confidential commercial information whenever the agency "determines that it may be required to disclose" the requested data.[53]

Once submitters are notified under this procedure, they must be given a reasonable period of time within which to object to disclosure of any of the requested material.[54] As one court has emphasized, however, this consultation is "appropriate as one step in the evaluation process, [but] is not sufficient to satisfy [an agency's] FOIA obligations."[55] Consequently, an agency is "required to determine for itself whether the information in question should be disclosed."[56]

If the submitter's objection is not, in fact, sustained by the agency, the submitter must be notified in writing and given a brief explanation of the agency's decision.[57] Such a notification must be provided a reasonable number of days pri-

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[51](...continued)
revealed that agency had been "careful in its selection of records for release, and in fact [had] denied the release of some records") (appeal pending); Source One, No. 92-Z-2101, transcript at 4 (D. Colo. Nov. 10, 1993).

[52] 3 C.F.R. 235 (1988) (applicable to all executive branch departments and agencies), reprinted in 5 U.S.C. § 552 note (1994) and in FOIA Update, Summer 1987, at 2-3.

[53] Exec. Order No. 12,600, § 1.

[54] Id. § 4. But cf. McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 323 (D.D.C. 1995) (finding that agency "simply does not have the authority to require [submitter] to justify again and again why information, the disclosure of which has been enjoined by a federal court, should continue to be enjoined" and that agency must instead take steps to "have the existing injunction modified or dissolved"), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996).

[55] Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996).

[56] Id.; accord Exec. Order No. 12,600, § 5 (notification procedures specifically contemplate that agency makes ultimate determination concerning release); see also National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974) (in justifying nondisclosure, submitter's treatment of information held not to be "the only relevant inquiry"; rather, agency must be satisfied that harms underlying exemption are likely to occur).

[57] Exec. Order No. 12,600, § 5; see McDonnell Douglas, 895 F. Supp. at 328
(continued...)

or to a specified disclosure date, which gives the submitter an opportunity to seek judicial relief.[58] Executive Order 12,600 mirrors in many ways the policy guidance issued by the Office of Information and Privacy in 1982,[59] and for most federal agencies it reflects what already had been existing practice.[60]

This executive order predates the decision of the Court of Appeals for the District of Columbia Circuit in Critical Mass Energy Project v. NRC,[61] and thus does not contain any procedures for notifying submitters of voluntarily provided information in order to determine if that information is "of a kind that would customarily not be released to the public by the person from whom it was obtained."[62] (For a further discussion of this "customary treatment" standard, see Exemption 4, Applying Critical Mass, above.) As a matter of sound administrative practice, however, agencies should employ procedures analogous to those set forth in Executive Order 12,600 when making determinations under this "customary treatment" standard.[63] Accordingly, if an agency is uncertain of the submitter's customary treatment of information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment--including any disclosures that are customarily made and the conditions under which such disclosures occur.[64] The agency should then make an objective determination as to whether or not the "customary treatment" standard is satisfied.[65] Of course, in the event a submitter challenges an agency's threshold determination under Critical Mass concerning whether the submission is "required" or "voluntary," the agency should be careful to include in the administrative record a full justification for its position on that issue as well.[66]

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[57](...continued)
(submitter "not denied due process of law just because [agency] regulations do not allow cumulative opportunities to submit justifications and to refute agency decisions").

[58] Exec. Order No. 12,600, § 5.

[59] See FOIA Update, June 1982, at 3 ("OIP Guidance: Submitters' Rights").

[60] See FOIA Update, Fall 1983, at 1 (describing agency submitter notice practice); see also FOIA Update, Summer 1987, at 1 (same).

[61] 975 F.2d 871 (D.C. Cir. 1992) (en banc).

[62] Id. at 879.

[63] See FOIA Update, Spring 1993, at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking"); see also id. at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4").

[64] See id. at 7.

[65] See id.

[66] See McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 241-42 (E.D. Mo. 1996) (agency's finding that submission was required "not supported by
(continued...)

The procedures set forth in Executive Order 12,600 do not provide a submitter with a formal evidentiary hearing. This is entirely consistent with what has now become well-established law--i.e., that an agency's procedures for resolving a submitter's claim of confidentiality are not inadequate simply because they do not afford the submitter a right to an evidentiary hearing.[67] Agencies should be aware, though, that confusion and litigation can result from using undocumented conversations as a short-cut method of avoiding scrupulous adherence to these submitter-notice procedures.[68]

Similarly, procedures in the executive order do not provide for an administrative appeal of an adverse decision on a submitter's claim for confidentiality. The lack of such an appeal right has not been considered by the D.C. Circuit, but it has been addressed by the District Court for the District of Columbia, which has flatly rejected a submitter's contention that an agency's decision to disclose information "must" be subject to an administrative appeal.[69]

The Court of Appeals for the Fourth Circuit had an opportunity to confront this issue in Acumenics Research & Technology v. Department of Justice.[70] There, in analyzing Department of Justice regulations which do not provide for an administrative appeal, the Fourth Circuit found that the procedures provided for in the regulations--namely, notice of the request, an opportunity to submit objections to disclosure, careful consideration of those objections by the agency, and issuance of a written statement describing the reasons why any objections were not sustained--in combination with a "face-to-face meeting that, in essence, amounted to an opportunity to appeal [the agency's] tentative decision in favor of

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[66](...continued)
substantial evidence" and consequently agency decision found to be "contrary to the law"), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 13 (D.D.C. 1996) (agency's failure to provide "support" for its conclusion that submission was required rendered its decision "not in accordance with law"), appeal voluntarily dismissed, No. 96-5163 (D.C. Cir. July 3, 1996).

[67] See National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 746 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring in result); see also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1159 (D.C. Cir. 1987).

[68] See Federal Elec. Corp. v. Carlucci, 687 F. Supp. 1, 5 (D.D.C. 1988) (disappointed bidder brought action seeking to have solicitation declared void after agency had released its cost data, in absence of submitter objections to release, which submitter claimed was due to "apparent misunderstanding as to what was actually going to be released"), grant of summary judgment to agency aff'd, 866 F.2d 1530 (D.C. Cir. 1989).

[69] Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 6 (D.D.C. Sept. 2, 1993).

[70] 843 F.2d 800, 805 (4th Cir. 1988).

disclosure," were adequate.[71] The Fourth Circuit, however, expressly declined to render an opinion as to whether the procedures implemented by the regulations alone would have been adequate.[72]

Likewise, the Court of Appeals for the Ninth Circuit has upheld the adequacy of an agency's factfinding procedures that did not provide for an administrative appeal per se.[73] In that case, the agency's procedures provided for notice and an opportunity to object to the request, for consideration of the objection by the agency followed by a written explanation as to why the objection was not sustained, and then for another opportunity for the submitter to provide information in support of its objection.[74] After independently reviewing the record, the Ninth Circuit found that such procedures were adequate and accordingly held that the agency's decision to disclose the information did not require review in a trial de novo.[75]

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[71] Id.

[72] Id. at 805 n.4.

[73] Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1348 (9th Cir. 1990).

[74] Id.

[75] Id.

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